

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY JUWANN GUYTON,

Defendant-Appellant.

UNPUBLISHED
December 2, 2014

No. 317970
Wayne Circuit Court
LC No. 12-010942-FC

Before: RIORDAN, P.J., and SAAD and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 10 to 15 years for armed robbery and two years for felony-firearm. We affirm.

I. JURY INSTRUCTION

Defendant contends that the trial court erred in providing an improper jury instruction. During its deliberations, the jury submitted a note to the court, inquiring about defendant's age at the time of the crime. The court responded as follows: "There was no evidence presented as to his age, and you are not to consider age when determining whether the elements have been proven." After reviewing the instruction, defense counsel stated: "I have no objection."

"Counsel's affirmative expression of satisfaction with the trial court's jury instruction waived any error." *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). As our Supreme Court has held, when defense counsel states, "I have no objections," that is an "express and unequivocal indication[] that [defense counsel] approved of the instructions" and waived any error. *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011). Accordingly, defendant's challenge to the court's instruction is waived.

Even if we were to review this issue, the trial court was not in error. The trial court's instruction—that no evidence was presented about defendant's age, and age was not an element of the offenses—was an accurate representation of the trial and the law. Defendant's age was not at issue in the case, there was no evidence presented of defendant's age, and the law does not require such a showing. MCL 750.529; MCL 750.227b; see also *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007) ("the trial court's instructions properly confined the jury to the

acts charged, for purposes of rendering a verdict thereon.”).¹ Defendant was not denied a fair trial.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Defendant also contends that defense counsel provided ineffective assistance of counsel regarding the jury instruction discussed *supra*. Because “[w]e have previously denied defendant’s request for a remand . . . and we decline to reconsider defendant’s request . . . our review of defendant’s claim[s] of ineffective assistance of counsel is limited to errors apparent on the record.” *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

B. ANALYSIS

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise.” *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim for ineffective assistance of counsel, a defendant first must establish that “counsel’s representation fell below an objective standard of reasonableness.” *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012) (quotation marks and citation omitted); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Second, the defendant must show that trial counsel’s deficient performance prejudiced his defense, meaning “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Vaughn*, 491 Mich at 669 (quotation marks and citation omitted); see also *Strickland*, 466 US at 687.

Defendant has not established that his counsel behaved objectively unreasonable. As discussed *supra*, the trial court’s instruction was an accurate statement of the law and the evidence presented at trial. Thus, any objection would have been futile, and “[t]rial counsel is not required to advocate a meritless position.” *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). While defendant contends that it was “obvious” the jury’s question was about the victim’s credibility, rather than the elements of the crime, we disagree. There was no obvious purpose behind the jury’s question, and defense counsel is not required to read the jury’s collective mind. Nor is there any indication that the failure to object to the trial court’s instruction—which correctly communicated the law—altered the outcome of the trial. *Vaughn*, 491 Mich at 669.

¹ The only reference to defendant’s age came from defense counsel’s question during cross-examination, which is not evidence. *People v Brown*, 267 Mich App 141, 153; 703 NW2d 230 (2005). The victim testified that he did not know defendant’s age, but would not be surprised if defendant was 14 years old when they first met.

III. CONCLUSION

We find no error in the challenged jury instruction. Because defendant was not deprived of a fair trial or the effective assistance of counsel, reversal and remanding is not warranted. We affirm.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Michael J. Talbot